No. 189

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1957

MILTON KNAPP,

Petitioner,

against

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York,

Respondents.

BRIEF FOR PETITIONER.

BERNARD H. FITZPATRICK,
WILLIAM J. KEATING,
Counsel for Petitioner,
37 Wall Street,
New York 5, N. Y.

INDEX.

Cases Cited.

STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

MILTON KNAPP,

Petitioner,

against

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York,

Respondents.

PETITIONER'S BRIEF.

Certiorari granted upon dismissal of an appeal taken from a final order of the New York Court of Appeals affirming, as did the intermediate appellate court, an order of the New York Supreme Court, Special Term, New York County, denying and dismissing appellant's petition in a prerogative writ proceeding for review of (certiorari) and prohibition against a Mandate of the Court of General Sessions, New York County, imposing a fine upon appellant and committing him to jail for a criminal contempt of that court.

Opinions Below.

The New York Court of Appeals, 2 N. Y. 2nd 913, handed down no opinion but amended its remittitur to show the necessary decision of the two federal questions originally proposed for review 2 N. Y. 2d 975 (R. 103).

The New York Supreme Court, Appellate Division, First Department, per Bergan, J. rendered an opinion which is reported at 2 App. Div. 2d, 579 and also at 157 N. Y. Supp. 2d 158 (R. 93).

The New York Supreme Court, Special Term, New York County, Markowitz, J. rendered an opinion which is unreported (R. 90).

The Court of General Sessions of New York County, Schweitzer, J. rendered an opinion which is not officially reported but appears at 157 N. Y. Supp. 2nd 820 (R. 81).

Jurisdiction.

Jurisdiction was acquired by grant of certiorari (R. 104) under 28 U. S. C. §2103 upon dismissal of an appeal taken from an order of the Court of Appeals of the State of New York, the highest court of that State, which order was made March 8th, 1957 (R. 101). Notice of appeal to this Court was served and filed May 13th, 1957, after the Court of Appeals had, on April 4th amended its remittitur to show that it had decided adversely to Petitioner the question upon which certiorari has been granted (R. 103).

The question presented is reviewable by certiorari by virtue of the provisions of 28 U. S. C. §1257(3). The proceeding originated in the Court of General Sessions of New York County which, on May 22d, 1956, summarily convicted Petitioner of a criminal contempt for his refusal to answer questions directed to the ascertainment of whether he had paid money to certain named representatives of the labor union representing his employees. Petitioner, an employer in an industry affecting commerce, had been called as a witness before a Grand Jury appendant to the Court of General Sessions in the course of an investigation under New York Penal Law Sections 380, 580 and 850, which deal

with bribery of labor union representatives, conspiracy and extortion. Petitioner's refusal to answer was put upon the ground that the answers would tend to incriminate him under a Federal Statute, Taft-Hartley Act Section 302, 29 U. S. C. §186, regulating, under penal sanction, payments to union representatives. Petitioner contended that since the source of his peril was Federal, he was privileged to decline to answer by virtue of the Fifth Amendment to the United States Constitution which binds the state courts through the Supremacy Clause, Art. VI, Cl. 2, as well as through the Privileges and Immunities Clause of the Fourteenth Amendment.

Review by the State Supreme Court, Special Term, New York County, by the Appellate Division of the Supreme Court, and by the Court of Appeals of New York resulted in a series of affirmances of the conviction, the last of which is the order appealed from. An amendment of remittitur (R. 103) certifies that the question was entertained and decided by the high court of the State.

Petitioner was imprisoned on the day of the handing down of the original mandate, but was enlarged the following day without bail and remains enlarged pending the determination here by virtue of an order made by the Chief Judge of the Court below.

Question Presented.

Whether an employer in an industry affecting commerce, called before a Grand Jury of the State as a witness in the course of an investigation concerning the state penal offenses of bribery, extortion and conspiracy connected with labor union operations, is privileged, by the Fifth Amendment to the United States Constitution, to decline to answer questions of such character that affirm-

ative answers thereto would establish the *corpus* of the federal crime of unauthorized payment of moneys to an official of the labor union representing his employees, Taft-Hartley Act, Sec. 302 (29 U. S. C. 186; 61 Stat. 157); and whether his ensuing punishment for contempt by a State Court is not barred by the Supremacy Clause, Art. VI, Cl. 2 of the United States Constitution and also by the "Privileges and Immunities" Clause of the Fourteenth Amendment.

Statutes Involved.

Labor-Management Relations Act, 1947 (Taft-Hartley Act) Section 302, 29 U. S. C. §186, 61 Stat. §157: Constitution; Art. VI Cl. 2 (supremacy), Amendment V (self-incrimination), Amendment XIV, Section 1 (privileges and immunities).

The texts of the foregoing, so far as material, are as follows:

1. Labor Management Relations Act 1947 (Taft-Hartley Act) Sec. 302, 29 U. S. C. §186, 61 Stat. §157.

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

* * * * * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.'

* * * * * *

2. Constitution, Art. VI, Cl. 2.

> "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

3. Constitution, Amendment V.

> "No person . . . shall be compelled in any criminal case to be a witness against himself, . . ."

4. Constitution, Amendment XIV, Section 1.

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . .

Statement.

A. Proceedings in General Sessions.

The petitioner is a co-partner of Eagle Reel and Manufacturing Company, a Bronx (R. 26) concern, concededly (R. 53) engaged in interstate commerce. The manufacturing operations of Eagle Reel are organized by a labor organization known as Local 239, International Brotherhood of Teamsters of which one Phillip Goldberg (sometimes referred to as "Greenberg" in the record) and one Sam Goldstein are officials (R. 49, 50-51).

At the time comprehended by the questions (set out below) which petitioner declined to answer there existed

contractual relations between the employing firm and that local union covering the wages, hours and working conditions of the employees (R. 49-51).

The petitioner on April 23, 1956 appeared as a witness before the Third April Grand Jury of New York County and was asked a series of questions designed to elicit information as to payment of monies from appellant employer to Goldberg. He declined to answer on the ground that the answers might tend to incriminate him. Typical of the questions are the following (R. 12-13) which, if answered affirmatively, would establish the *corpus* of a violation of section 302 of the Labor Management Relations Act of 1947 (Taft-Hartley Act, 29 U. S. C. §186):

> "Q. Mr. Knapp, on or about October 28th, 1955, did you give Philip Goldberg, a representative of Local No. 239, International Brotherhood of Teamsters, the sum of $500"?
>
> "Q. Mr. Knapp, on or about October 28th, 1955, did you go to the Public National Bank and Trust Company at 149th Street and Prospect Avenue and cash this check, Grand Jury Exhibit Number One, and receive from the bank the sum of $500"?
>
> "Q. Mr. Knapp, on October 28th, 1955, were you accompanied by Phillip Goldberg, an official of Local No. 239, International Brotherhood of Teamsters, when you went to the Public National Bank and Trust Company, located at 149th Street and Prospect Avenue"?
>
> "Q. Isn't it a fact that Sam Goldstein is an official of Local No. 239, International Brotherhood of Teamsters"?
>
> "Q. Did you ever pay or give any sum of money to Samuel Goldstein"?

Thereafter the Grand Jury conferred immunity on the petitioner. The same questions were again put to him and he again asserted his privilege against self-incrimination.

Petitioner was resubpoenaed to appear before the Grand Jury on April 25, 1956, at which time the same questions were put to him. He continued to assert his privilege and was directed by the foreman to appear before the respondent, Honorable Mitchell D. Schweitzer, Judge of the Court of General Sessions (R. 17-23) in Part I of that court.

There the District Attorney made application for a direction by the Court to the petitioner to answer the questions put to him in the Grand Jury (R. 15). The application was founded upon a statement by the District Attorney that, "there is now pending" before the Grand Jury a John Doe investigation of conspiracy, bribery and extortion among labor officials. Respondent Judge Schweitzer directed petitioner to return to the Grand Jury on April 27 and answer the questions over the objection that the petitioner asserted his privilege in apprehension of a danger of admitting the *corpus* of a violation of the Taft-Hartley Act (R. 31-32):

The petitioner obeyed the direction to return to the Grand Jury but continued to assert his privilege and respectfully declined to answer the same questions. Thereupon the District Attorney again procured petitioner to appear on April 30th before respondent Judge Schweitzer, where the District Attorney moved the Court to punish the petitioner summarily for contempt.

At a continuance on May 21, 1956 counsel for petitioner summarized his opposition to the District Attorney's application to punish petitioner in four points, one of which (R. 67) was:

> "Second, the immunity conferred on the witness pursuant to Section 2447 is insufficiently broad in that it does not comprehend an immunity from prosecution under the applicable Federal statutes;"

The Court *viva voce,* expressly ruled on the self-incrimination question (R. 69).

On May 22 the Court adjudged petitioner guilty of contempt, sentenced him to confinement in the civil prison for a period of 30 days and fined him $250 (R. 76).

The opinion (R. 81) expressly rules (R. 89) on the question of incrimination in the Federal forum.

B. Proceedings in Special Term.

Following the commitment, petitioner applied to the Supreme Court, Special Term, New York County for review (certiorari) and prohibition under Article 78 of The New York Civil Practice Act (R. 3). The petition recited the partnership of petitioner in the Bronx firm, the involvement of the firm in interstate commerce, the organization of the plant by Local Union 239, the official status of Greenberg (Goldberg) in the Union and the existence of collective contractual relations between the Union and the Bronx firm, the appearance of petitioner as a witness before the Third April Grand Jury, the questioning of petitioner to elicit information as to payments to Greenberg, the assertion by petitioner of his privilege against self-incrimination, the conferring of immunity upon appellant by the Grand Jury and petitioner's subsequent adherence to his claim of privilege, the application of the respondent District Attorney before the respondent Judge for an instruction to the petitioner to answer and the direction to the petitioner to answer over the following objection *inter alia:*

> (b) That the grant of immunity pursuant to Section 2447 of the Penal Law is insufficiently broad in that it does not bar prosecution of the petitioner for violation of Section 302 of the Labor Management Relations Act of 1947 (R. 5).

The petition below goes on to recite petitioner's adherence to his refusal to answer, the application to punish him for contempt, the adjudication of contempt, and his com-

mitment. The petition concludes with an averment of initial application and a prayer for prohibition and review.

The amended answer (R. 7) raised no factual issue but denied the validity of the petitioner's objections to answering the questions, pleaded the legal insufficiency of the petition and prayed for denial and dismissal.

The reply (R. 8) set up *inter alia*, on the issue of petitioner's jeopardy in respect of Federal prosecution, that the Federal Prosecutor, Paul Williams, had publicly stated his intention to cooperate with the respondent District Attorney in the investigation of labor union bribery and extortion and that said respondent intended on his part to cooperate with the Federal Prosecutor.

No triable issue of fact appeared on the hearing and the Special Term, upon the pleadings and the minutes of General Sessions dismissed the petition and denied the same (R. 1). The memorandum opinion (R. 90) adopted the reasoning of the opinion in the Court of General Sessions.

C. Proceedings in Appellate Division.

On appeal taken to the Appellate Division, First Department, a unanimous order affirming the order of the Special Term was entered on November 27th, 1956, with opinion (R. 93) by Bergan, J. in which all concurred.

D. Proceedings in Court of Appeals.

The Court of Appeals affirmed without opinion by order (R. 101) of March 8th, 1957. However, it indicated, by order of April 4th, 1957 amending its remittitur, that it had necessarily entertained the question of the right, under the Fifth Amendment, of appellant to decline to answer and had decided it adversely to appellant (R. 103).

Summary of Argument.

New York has asked questions tending to establish the *corpus* of the federal crime of unauthorized payments to labor officials, petitioner's federal jeopardy is not remote but real; his refusal to answer is put upon that federal ground.

The Fifth Amendment confers on him at least the primary right to avoid federal prosecution springing from his own compelled testimony; ancillary to the primary right is the right to refuse to give testimony, and this right is independent of the function of the inquisitor. This ancillary right is a Federal right which states must respect.

Respondents rely on the "two sovereignties" doctrine. This doctrine is founded in part upon a misapprehension of the English doctrine as settled in *U. S.* v. *McRae*, and in part upon undue emphasis placed upon mere dicta found in *Brown* v. *Walker*, *Jack* v. *Kansas* and *Hale* v. *Henkel*. The doctrine that the first eight Amendments control only the action of the Federal Government is not so broad that there is not a negative duty in the states to refrain from preventing the citizen from obtaining the benefit of the Amendments as against the Federal Government.

The true doctrine is the doctrine of Federal Supremacy under which the judges of New York may not interfere with the right of petitioner against the Federal Government.

Petitioner's right against the Federal Government is a right of federal citizenship which is a privilege and an immunity protected by the Fourteenth Amendment.

Argument.

The Petitioner is an employer in an industry affecting commerce. In a New York State Court he was asked a series of questions designed to ascertain whether he has paid money to one Goldberg and to one Goldstein, who on the face of the questions, are sought to be identified as officials of the labor union which represents his employees.

A federal statute, Taft-Hartley Act, Section 302, makes it a misdemeanor (Subsection d):

> "... for any employer to pay ... any money to any representative of any of his employees who are employed in an industry affecting commerce."

A union official is a representative within the meaning of the misdemeanor.[1]

Petitioner declined to answer the questions upon the precise ground of exposure to self-incrimination under the cited portion of the Taft-Hartley Act, and for such refusal he stands convicted of contempt.

There can be no cavil about the reality of the Petitioner's jeopardy. The questions, if answered affirmatively, would establish the *corpus* of the federal crime. These are not penumbral questions; they raise dark and full blown the shadow of federal criminal conviction. There is here no limitation, and indeed, no possibilty of limitation, as there was in *Jack* v. *Kansas*[2] of the questions, or of their incriminating possibilities which would keep them without the ambit of the federal criminal law. Nor can the dalliance or official inertia or "sportsmanship" of the federal prosecutor be presumed upon, as in *Jack* v. *Kansas*, for the

---

[1] *U. S.* v. *Ryan*, 350 U. S. 299.

[2] 199 U. S. 372.

record here shows a parallel effort on the part of the Federal Prosecutor concerned and the New York District Attorney to stamp out bribery of union officials. (R. 9, 99)

There is here no geographic remoteness nor extradition safeguard as in *King of Two Sicilies* v. *Willcox*;[3] nor an unimaginable use of a dormant legal weapon, as in *Queen* v. *Boyes*.[4] Nor was the instance court here without knowledge of law of the "other" jurisdiction, as in the *Willcox*[4a] case, for it was bound to take judicial notice of it.

Let it be observed also that Petitioner's testimony, if New York succeeds in extorting it from him, may not merely inspire the federal prosecution, but can, in that federal prosecution, be read against him verbatim.[5] Nor does the fact that New York has granted immunity to this Petitioner extinguish or make less remote the possibility of federal prosecution.[5a]

Faced with this tangible, proximate and undiminished peril of federal prosecution, petitioner asserts that he is protected in his refusal to answer by the Fifth Amendment.

> "No person . . . shall be compelled in any criminal case to be a witness against himself."

At the very least, this is a limitation on the Federal Government,[6] and by its terms a limitation on its prosecuting arm. It means, at minimum, that the citizen shall not be compelled

> "... in any [federal] criminal case ..."

---

[3] 7 State Trials, N. S. 1050.

[4] 1 B. & S. 311.

[4a] Cf. *U. S.* v. *MacRae*, 3 L. R. Ch. App. 79 explaining and limiting *Willcox*. In the *MacRae* case, the criminating law appeared on the face of the pleadings.

[5] *Feldman* v. *U. S.*, 322 U. S. 487.

[5a] *Ibid.*

[6] *Barron* v. *Baltimore*, 7 Pet. 243.

to give incriminating testimony. The Amendment is not less than a guaranty to him of safety against federal prosecution inspired by or based upon testimony wrung from him by compulsion.

The primary right conferred by the Amendment is a right to avoid federal prosecution. The right does not exist where the danger apprehended is not a danger of prosecution[7] and the right abates with the danger of prosecution however that may occur; whether by grant of immunity,[8] by pardon,[9] by the running of the statute of limitations[10] or by former jeopardy.[11] But to produce an abatement of the right the abating event must be tailored to fit the danger of prosecution.[12]

The right then, is fundamentally a right to avoid a federal prosecution based upon compelled testimony. Only secondarily is it a right to decline to testify; the right to decline to testify is wholly ancillary to the right to avoid a prosecution stemming from the testimony.

This ancillary right to decline to testify is not confined to criminal prosecution wherein the witness is or is subject to being proceeded against. One need not be a defendant or prospective defendant to assert the right. A witness, as such, may claim the privilege. He may claim it in civil litigation.[13] He may claim it in administrative proceedings.[14] He may claim it before purely inquisitorial bodies

---

[7] *Ullman* v. *U. S.*, 350 U. S. 422.

[8] *Hale* v. *Henkel*, 201 U. S. 43.

[9] *Brown* v. *Walker*, 161 U. S. 591.

[10] *Ibid.*

[11] *Ibid.*

[12] *Counselman* v. *Hitchcock*, 142 U. S. 547.

[13] *McCarthy* v. *Arndstein*, 266 U. S. 34.

[14] *Vajtauer* v. *Commissioner*, 273 U. S. 103.

such as Congressional Committees.[15] With sound reason, the law fears the creation of a tandem between inquisitor and prosecutor whereby a person may be compelled to feed the prosecutor to his own damnation.

It may thus safely be said that the right to decline to testify is independent of the function of the inquisitor. Be the function the adjustment of private rights, the restraint of the criminal, the dispatch of public business, the framing of new laws, it is all one so far as the Amendment is concerned—and all immaterial. The right is dependent on the proximity of prosecution and not upon the color of the inquisitor's robe. It is assertable even where

> ". . . the proceedings give no warrant for thinking [the inquisitorial body is] attempting or intending to try [an individual] at its bar or before its committee for any crime or wrongdoing.[16]

The 'right of silence' is no "brooding omnipresence"; detached from the operations of the Federal Government; it is a definite limitation addressed to the action of a definite group of federal officials whose function is the prosecution of breaches of federal statutes, and wholly dependent upon and ancillary to the possible action of that group of federal officials; it is dependent upon them and not upon the source of the inquisition.

The Petitioner here now asserts the ancillary right of silence in a forum not of the central government's creation, but one bound, none the less, by federal organic law. He asserts that ancillary right of silence for the protection of his primary right to avoid federal prosecution based on compelled testimony.

---

[15] *Quinn* v. *U. S.*, 349 U. S. 155.

[16] *McGrain* v. *Daugherty*, 273 U. S. 135, 179-80.

What power lies in a state court as inquisitor which makes it superior to a Congressional Committee as inquisitor? Is not the same ancillary right involved? Does not the same primary right exist? And is not the ancillary right as federal in its origin as the primary right from which it springs? Is the state court, which has no prosecuting functions in the federal field, not on a par with a Congressional Committee which has no prosecuting functions? Or is it to be presumed that there is a closer nexus, a clearer channel of information between one arm of the federal government and another than between a state agency and a federal prosecutor, whereby the peril of the witness is increased?

The answer to these questions, say the respondents, is to be found in the so-called "two sovereignties" rule supposedly developed as to the matter of self-incrimination through such cases as *Brown* v. *Walker*,[17] *Jack* v. *Kansas*,[18] *Hale* v. *Henkel*,[19] *U. S.* v. *Murdock*[20] and *Feldman* v. *U. S.*[21] and recently, in another application (the related field of double jeopardy) so seriously questioned as to result in an affirmance by an equally divided Court. (*Bartkus* v. *Illinois*, No. 39 Oct. Term 1957 Decided January 6, 1958.) Petitioner respectfully asserts that the "two sovereignties" rule is a cumulus of fallacies at least as applied to the matter of self-incrimination.

Prior to the decision of *Brown* v. *Walker*, the only case decided by this Court involving federal-state relationships in the field of self-incrimination was *United States* v. *Saline Bank*, 1 Pet. 100, wherein a discovery sought in a federal

---

[17] 161 U. S. 591.

[18] 199 U. S. 372.

[19] 201 U. S. 43.

[20] 284 U. S. 141.

[21] 322 U. S. 487.

court was held to be barred as calling for facts criminating under Virginia penal laws.

Brown v. *Walker* involved an objection that an immunity statute was not sufficiently broad to discharge the rights of a witness under the Fifth Amendment in that it did not encompass an immunity against crimes against the State of Pennsylvania. The majority (per Brown, J.), did not hold such an immunity unnecessary, but instead held the statute sufficiently broad to bar state prosecution:

> "... The act in question contains no suggestion that it is to be applied only to the Federal Courts. It declares broadly that ... 'no person shall be prosecuted ... for or on account of any transaction matter or thing, concerning which he may testify'."

Any residual risk of prosecution outside the federal jurisdiction was described, quoting *Queen* v. *Boyes*,[22] as an

> "... extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct."

and disposed of on the ground of remoteness. *Brown* v. *Walker* cannot properly be looked upon, therefore, as furnishing the root-stock for a "two sovereignties" doctrine.

Thus the rule stood until the 1905 term; the "two sovereignties" doctrine was no part of it. Proximity *vel* remoteness was the only consideration, the source of the peril, state or federal, was not a valid consideration. Then followed a series of three cryptic and, at least on the surface, mutually contradictory decisions, *Jack* v. *Kansas*,[23] *Ballman* v. *Fagin*[24] and *Hale* v. *Henkel*.[25]

---

[22] 1 B. & S. 311; 21 Eng. Rep. 730.

[23] 199 U. S. 372.

[24] 200 U. S. 186.

[25] 201 U. S. 43.

Jack v. *Kansas* arose out of a state grand jury investigation into violations of its local anti-trust laws. The witness assailed the Kansas immunity statute as not affording protection against a Sherman Act prosecution. The Kansas courts, however, had held that inquiry into interstate transactions was not permissible and the record showed that the questions were, in fact, limited to local transactions. The majority, which included Holmes, said

> ". . . We do not believe that in such case there is any real danger of a federal prosecution, or that such evidence would be availed of by the Government for such purpose"

but followed up with the cryptic statement

> "We think the legal immunity is in regard to a prosecution in the same jurisdiction, and when that is fully given it is enough."

Why, having found that the record would not support a claim of federal incrimination, the Court should make the latter comment is puzzling. Still more puzzling is the use made of the *Jack* case by Holmes in *Ballman* v. *Fagin*, discussed *post*. The *Jack* case is the only case to be entertained by this Court, prior to the case at bar, in which a claim of federal incrimination was asserted in a state court.

Ballman v. *Fagin*[26] was decided later in the same term. It held that a witness before a federal grand jury was protected in refusing to testify as to matters criminating under the bucket-shop statutes of Ohio; thus reasserting the *Saline Bank* rule. The opinion by Holmes cites *Jack* v. *Kansas* in support of the ruling, obviously interpreting that case as not supporting the "two sovereignties" doctrine.

---

[26] 200 U. S. 186.

Hale v. *Henkel* was argued at the same term. The major issue was the application of the privilege to corporations, but it was also contended that a corporate officer need not produce books and records before a federal grand jury when such evidence would tend to incriminate him under state law. The majority, without mentioning *Ballman* v. *Fagin*, disposed of the issue thusly:

> "The further suggestion that the statute offers no immunity from prosecution in the state courts was fully considered in *Brown* v. *Walker* and held to be no answer. The converse of this was also decided in Jack *v.* Kansas . . . namely, that the fact that an immunity granted to a witness under a state statute would not prevent a prosecution of such witness for a violation of a Federal statute, did not invalidate such statute under the Fourteenth Amendment. It was held . . . that the possibility that information given by the witness might be used under the Federal act did not operate as a reason for permitting the witness to refuse to answer. . . . The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. . . ."

The reference to *Brown* v. *Walker*, while literally true, is made to carry the implication that the Federal Government has no concern about the possibility of state prosecution whereas the case actually rested on the supremacy clause.[27] And while *Jack* v. *Kansas* is, in result, a converse holding, considered in the light of its citation in the *Ballman* case, it falls short of holding that the state is unconcerned about the possibility of federal incrimination. To these errors

[27] An interpretation reaffirmed in *Ullman* v. *U. S.*, 350 U. S. 422.

of implication, there is added a misunderstanding of the English rule.[28] Curiously, the dissenting Justices, Brewer and Fuller, were under the impression that the majority has held merely that

> ". . . the immunity granted by the Federal statute is sufficient protection against both the Nation and the several states."

The next step in the development of the "two sovereignties" doctrine was taken in *U. S.* v. *Murdock*.[29] This was an indictment for wilful failure to furnish income tax information, against which a special plea had been filed setting up an exposure to incrimination under the gambling and possibly the bribery laws of Illinois. This Court, sustaining a demurrer to the plea, said

> "The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."

Incongruously, however, it also relied on the supremacy clause:

> "Investigations for federal purposes may not be prevented by matters depending upon state law. Const. art. 6 §2."

The case repeats the error of *Hale* v. *Henkel* respecting the English law.

---

[28] The quotation is based on *King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.) 1050, which was limited to its own peculiar facts by the decision in *United States* v. *McRae*, L. R. 3 Ch. App. 79 holding that an exposure to forfeiture by the law of the United States was a good plea in bar to an English discovery proceeding.

[29] 284 U. S. 141.

In *Feldman v. United States,*[30] a mail fraud defendant was convicted in a Federal court upon evidence of a check "kiting" scheme given by him under compulsion of a state immunity provision in a New York statutory creditors proceeding. If the holding is limited to deciding that New York could not by its immunity statute, immobilize a federal prosecution or control the evidence therein there is little question of its soundness. But the majority opinion seems to hold state and nation to be as far apart as England and Sicily for testimonial purposes. It leans heavily on the

> "... settled principle of our Constitution ... that these (ten) Amendments protect only against invasion of civil liberties by the Government whose conduct they alone limit."

ignoring the obvious limitation that insofar as these Amendments create Federal rights in individuals, they impose the negative duty on states to refrain from interfering with individuals in the exercise of those rights.

> *Lyon* v. *Mutual etc. Ass'n.*, 305 U. S. 484;
> *United States* v. *Cruikshank*, 92 U. S. 542.

It further employs the questionable implications of *Jack* v. *Kansas, Hale* v. *Henkel* and *Murdock*, and subordinates the supremacy and remoteness grounds on which *Brown* v. *Walker* rested to the illustrative reference to "other sovereignty" contained in the language.

It should be remarked that the *Feldman* case is not dispositive of the issue in the case at bar. Feldman had not taken the one remedy open to him—that of resisting in the New York courts the disclosure of facts constituting a federal crime against which the New York statute could not immunize him. In the sense that he had not properly

---

[30] 322 U. S. 487.

resisted New York's questions, he was not compelled to answer. It is one thing to hold New York's immunity unavailing; it is quite another thing to hold that New York may compel the giving of evidence of federal crime.

It is respectfully submitted that the "two sovereignties" doctrine is error. It is error in that it is founded in part upon a concept of the common law rule which is a false concept. It is error in that it is founded upon a misemphasized interpretation of *Brown* v. *Walker*. It is error in that it is founded upon a tunnel-visioned construction of *Barron* v. *Baltimore*. It is error in that it ignores the nature of the right conferred by the Fifth Amendment. It is error in that it ignores the supremacy clause and its application in testimonial matters.

The true rule is not the "two sovereignties" rule but the rule of Federal supremacy, leaving to Congress and to the states the adjustment of such immunities as are necessary and expedient for the accomplishment of their proper social objectives, but respecting rights derived from the Federal Constitution to the extent that they are not displaced by proper immunities.

The right claimed by Petitioner here is a right deriving directly from the Fifth Amendment, the supreme law of the land. It is based on a primary right to avoid a federal prosecution springing from or furthered by his own compelled testimony. Ancillary to that primary right, is the right of silence, limited, of course, to the facts of federal import. As the primary right is federal, so the derivative right of silence is federal. As a federal right, the right of silence respecting federal crime is protected by the supremacy clause and the judges of New York are bound not to dishonor it.

The framers of the Ten Amendments, it may be conceded, were not writing a super-constitution for the states.

But neither were they giving the citizen a shield against the acts of the federal government which could be stripped from him by the states in pursuit of their own ends. New York here seeks to strip this Petitioner of his shield against a federal prosecutor.

The Court will note that this argument in no wise questions the doctrine of *Twining* v. *New Jersey*[31] and *Adamson* v. *California*.[32] No general claim is made that the Fourteenth Amendment fastened upon the states the obligation to observe the restrictions of the Bill of Rights. If the questions here related solely to state-created offenses, as did the matters included in *Twining* and *Adamson*, Petitioner's position would be untenable, for his claim rests solely upon his rights vis-a-vis the Federal Government.

Nonetheless, there is a sense in which the Fourteenth Amendment is applicable here. Petitioner, not as a citizen of New York, but as a federal citizen, has a right of silence referrable to a federal prosecution. This would be a privilege or immunity of a citizen of the United States as such, which no state may abridge. The right is one of that limited class arising

> "... out of the nature and essential character of the federal government and granted or secured by the Constitution."[33]

Petitioner is in an anomalous and mystifying situation brought about by the divorce of law from realism and its casual flirtation with mere words. He stands between two governments each solemnly chanting that it is evil to convict upon extorted testimony while one seeks to

---

[31] 211 U. S. 78.

[32] 332 U. S. 46.

[33] *Duncan* v. *Missouri*, 152 U. S. 382; *Slaughterhouse* Cases 16 Wall. 36.

extort and the other stands ready to use the extorted testimony to convict. Well might he say, "Thou hypocrites!".

Conclusion.

The order appealed from should be reversed and the cause remanded for vacatur of the mandate of commitment.

Dated New York, January 15, 1958.

Respectfully submitted,

BERNARD H. FITZPATRICK,
WILLIAM J. KEATING,
Counsel for Petitioner,
37 Wall Street,
New York 5, N. Y.